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No. 85-670

IN THE

Supreme Court of the United States

October Term, 1985

ETHYL CORPORATION,

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC and LOCAL NO. 7441, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. STATEMENT OF THE CASE

On October 18, 1985, the petitioner, Ethyl Corporation* ("Ethyl"), filed its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit (the "Petition"). On or about January 15, 1986, at the Court's request, the respondents in this case, the United Steelworkers of America, AFL-CIO-CLC, and Local No. 7441, United Steelworkers of America, AFL-CIO-CLC (hereinafter jointly referred to as the "Union"), filed their

*The list of Ethyl's subsidiaries and affiliates enumerated in the Petition remains current.

brief in opposition to the Petition (the "Opposing Brief"). The instant brief is a reply to the Opposing Brief and serves to underscore the reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 22, 1985.

In its Opposing Brief, the Union has asserted four arguments in opposition to the writ of review sought by Ethyl. While these contentions possess varying degrees of surface appeal, none can survive more than cursory scrutiny. Indeed, it is the misleading nature of the Union's arguments combined with certain misstatements of law which compels the submission of this Reply Brief.

II. ARGUMENT

A. The Union Has Materially Misstated the Law in an Effort To Bolster the Arbitrator's Award in this Case.

Striking first at the merits of the case, the Union contends that the arbitrator's award was entirely consistent with numerous arbitral and federal court decisions on the vacation pay issue — that the award rested firmly on the "law of the shop." (Opposing Brief at 9.) It is precisely the "law of the shop" which distinguishes the instant controversy from the arbitral and Sixth Circuit opinions cited by the Union. And nowhere is this point emphasized more clearly than in a case completely mischaracterized by the Union, *Buchholtz v. Swift & Co.*, 609 F.2d 317 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980).

Contrary to the Union's apparent misreading of the decision, *Buchholtz* lends no support to the arbitrator's interpretation of the contract language at issue in the present dispute. Rather, relying on two significant elements of what may properly be termed the "law of the shop"— past practice and bargaining history — the Eighth Circuit in *Buchholtz* found inapposite the line of cases acclaimed by the Union:

> Accordingly, we conclude that in our opinion the plaintiffs were not eligible for vacation benefits under the terms of the contract to which each had agreed. We choose not to follow that line of authority which would prorate vacation benefits because the company's unilateral action in effectuating the shutdown made employment on the disability date impossible. *Schneider v. Electric Auto-Lite Co.*, 456 F.2d 366, 372 (6th Cir. 1972). *See also Baldwin-Montrose Chemical Co. v. International Union, United Rubber, Cork, Linoleum & Plastic Workers*, 383 F.2d 796, 798 (6th Cir. 1967). We so hold not only because we do not agree with the reasoning thereof, but because in neither of these cases is there any discussion of the bargaining history of the parties or the past practices in other related situations. As set forth above, it is clear from the bargaining history and past practice in this case, the facts relating to which were not seriously controverted, that the union and its members *knew* or should have known that the contract did not provide for vacation benefits upon the closing of the plant, bargained to obtain them, and settled without the requested change.

609 F.2d at 326-27 (emphasis in original).

As in *Buchholtz*, it is past practice and bargaining history which serve to distinguish determinatively the arbitral and Sixth Circuit cases cited by the Union from the instant one. Furthermore, these factors play a far different role in the present controversy from the one selfservingly advanced by the Union in its brief. (Opposing Brief at 10.) Rather than fail to shed light on ambiguous contract language (*id.*), the parties' established practices and bargaining history refuse to taint the otherwise clear language of the vacation eligibility clause. Moreover, past application of the December 31 payroll requirement defeats the notion of proration of benefits grounding the Sixth Circuit decisions relied on by the Union. *See Buchholtz*, 609 F.2d at 325 (court rejected the idea of prorating vacation benefits in view of a history of denying such benefits to employees who, prior to

the plant closing, had failed to meet a December 28 payroll requirement). Finally, the bargaining history demonstrates that the Union was completely aware of the frequently onerous consequences of the vacation eligibility language to which it had agreed. *See id.* at 327.

B. The Decision of the Seventh Circuit in this Case Is in Direct Conflict with Those of Several Other Federal Courts of Appeals on the Same Issue.

The Union makes two attempts to minimize the conflict created by the Seventh Circuit in this case with decisions of other federal appellate courts. First, the Union asserts that the contract language at issue was not plain and unambiguous as applied to the facts of this case. Hence, contends the Union, "[T]he decision below could not conceivably conflict with other Circuit Court decisions actually involving clear and unambiguous language." (Opposing Brief at 10.) Second, the Union asserts that the only conflict established by this case is one arising from dicta. (*Id.* at 11.) Both of these contentions are easily pierced by the same arrow.

It is difficult to take seriously the Union's challenge to the clarity of the vacation pay language as applied to the facts of this dispute. Neither the arbitrator nor the two lower courts even suggested that the provision was less than plain and precise. Indeed, how can employees terminated by a plant shutdown be considered "on the payroll of the Company" on a date subsequent to the closing? It is exactly this absence of ambiguity which compelled the Seventh Circuit to conclude that "there is no rule that an arbitrator, in order to find an implied condition, must first find the language in the contract to be ambiguous." (App.* at A-9.) It is also this clarity which creates a conflict between the Seventh Circuit's decision in this case and those of other federal appellate courts on the same issue.

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*"App." refers to the Appendix contained in the Petition.

The cornerstone of the Seventh Circuit's holding is that an arbitrator may find implied contractual conditions *even in the face of plain and unambiguous language dispositive of the question presented.* (App. at A-9 — A-11.) Absent a past practice evidencing a relaxation of the express language of the contract, other federal courts of appeals simply do not permit this result. *See, e.g., H. K. Porter Co. v. United Saw, File & Steel Products Workers*, 333 F.2d 596 (3d Cir. 1964); *Monongahela Power Co. v. Local 2332, IBEW*, 566 F.2d 1196 (4th Cir. 1976); *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir. 1982); *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977). The holdings in these cases, not just their reasoning, support this conclusion and create the resulting split of authority.*

C. *W. R. Grace* Neither Lessens the Judicial Conflict Created by the Present Decision nor Reduces the Need for Elaboration of the *Enterprise Wheel* Principles.

The Union's final argument is that this Court's 1983 decision in *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers*, 461 U.S. 757 (1983) resolves the conflict between the Seventh Circuit's decision in the present case and the numerous pre-1983 opinions discussed in the Petition. (Opposing Brief at 11-13.) This argument grossly overstates the reach of *W. R.*

*The Union surely elevates form over substance when it argues that no conflict exists between the instant case and the others cited in the Petition because none of the latter cases "involves either a vacation pay eligibility question, a plant shutdown, or a well established contract doctrine concerning actions by one party that render impossible another party's satisfaction of a condition precedent." (Opposing Brief at 11.) If the only conflicts resolved by this Court were those created by identical sets of facts being decided differently, very few cases would ever gain review. More germane to this case, federal courts applying conflicting legal standards to the same issue and thereby producing opposite results do no less damage to the unified and consistent body of federal law envisioned by this Court in Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), than would federal courts deciding the same set of facts differently.

Grace and totally ignores federal appellate decisions postdating *W. R. Grace*.

To be sure, *W. R. Grace* does reaffirm the guidelines established in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960): "Unless the arbitral decision does not 'dra[w] its essence from the collective bargaining agreement,' ... a court is bound to enforce the award and is not entitled to review the merits of the contract dispute." *W. R. Grace*, 461 U.S. at 764 (quoting *Enterprise Wheel*, 363 U.S. at 597). Unfortunately, however, neither *W. R. Grace* nor *Enterprise Wheel* answers the question posed by the Seventh Circuit's decision in this case: Can an award ignore the plain and unambiguous provisions of a collective bargaining agreement and still "draw its essence" from that same contract? The Seventh Circuit has answered this question in the affirmative, thereby empowering an arbitrator to invalidate the express terms of a contract by finding implied conditions. Other courts have denied the arbitrator the power to deviate from the plain terms of a contract in the absence of practices evidencing a relaxation of the express language. And the latter courts have continued so to limit the power of an arbitrator even after *W. R. Grace*.

Indeed, while Ethyl cited in its Petition several examples of cases conflicting with the Seventh Circuit's decision in this case which happened to predate *W. R. Grace* (*see* Petition at 8-11), Ethyl could easily have added several more-recent opinions to the same effect.* *See Clinchfield Coal Co. v. District 28, UMW*, 720 F.2d 1365 (4th Cir. 1983) (decided five months after *W.R. Grace*); *Johnston Boiler Co. v. Local Lodge No. 893, International Brotherhood of Boilermakers*, 753 F.2d 40 (6th Cir. 1985); *International Union of Operating Engineers, Local No. 9 v. Shank-Artukovich*, 751 F.2d 364 (10th Cir. 1985). There is nothing

*This fact was clearly indicated in the Petition by use of the introductory signal "*e.g.*" *See* A UNIFORM SYSTEM OF CITATION §2.2 (13th ed. 1981).

in these decisions or their predecessors which suggests a retreat, deliberate or otherwise, from the standards of arbitral review expressed in *Enterprise Wheel* and reaffirmed in *W. R. Grace*. The same may not be said of the Seventh Circuit's opinion in the present case: "It might in retrospect have been better if the Court had not said 'draws its essence from the collective bargaining agreement,' . . . ." (App. at A-5.)

In sum, a careful review of the cases cited and a reasoned analysis of the arguments presented by the Union in its effort to defeat Ethyl's request for a writ of certiorari serve only to reinforce the need for this Court's continued guidance regarding the proper role of the judiciary in reviewing arbitration awards. The Seventh Circuit will stand behind an arbitrator even if his award deviates from the plain terms of a collective bargaining agreement so long as he *says* he is interpreting the contract. Other courts simply do not permit an arbitrator to stray from the clear and unambiguous language of the agreement unless the parties have previously done so themselves. This conflict strikes at the very core of the labor-management relationship and can be resolved only by this Court.

III. CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January 1986, three copies of this Reply Brief of Petitioner were mailed, postage prepaid, to Paul Whitehead, Esq., Five Gateway Center, Pittsburgh, Pennsylvania, 15222, Counsel for Respondents. I further certify that all parties required to be served have been served.

DAVID L. SWIDER